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No. 00-1272

IN THE
SUPREME COURT OF THE UNITED STATES

DELAWARE COUNTY HOUSING AUTHORITY,
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V.

BARBARA BISHOP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF, AND BRIEF, OF *AMICI CURIAE*, HOUSING AND DEVELOPMENT LAW INSTITUTE AND NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI BY PETITIONER DELAWARE COUNTY HOUSING AUTHORITY

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Housing and Development Law Institute, a District of Columbia not-for-profit corporation, (HDLI) and the National

Association of Housing and Redevelopment Officials, a District of Columbia not-for-profit corporation, (NAHRO) respectfully move this Court for leave to file the attached Brief of *Amici Curiae* in support of the Petition for Certiorari of the Delaware County Housing Authority.

Movants, HDLI and NAHRO, state as follows:

1. The purpose of this motion is to request leave of this Court to file a Brief of Amici Curiae in support of the Petition for Certiorari of the Delaware County Housing authority.

2. Movants, HDLI and NAHRO have a strong interest in the legal issues raised by this case.

Housing and Development Law Institute (HDLI) is a nationwide non-profit organization that acts as a legal resource to local public housing agencies and their legal counsel. Formed in 1984, HDLI has a present membership of approximately 300 local public housing agencies and law firms. In addition to publishing periodicals and other materials and conducting educational activities relating to the law of affordable housing, HDLI acts on its members' behalf with respect to legal aspects of state and federal housing policy.

The National Association of Housing and Redevelopment Officials (NAHRO) is a nationwide non-profit organization dedicated to facilitating local community development and the provision of decent, safe and sanitary housing to low-income families. Formed in 1933, as the National Association of Housing Officials (NAHO), NAHRO is the oldest and largest national membership organization

devoted to affordable housing and community development. Its present membership numbers more than 8,400, including both agencies and public officials involved with affordable housing and community development throughout the Nation. NAHRO's member agencies own or manage approximately 1,340,000 units of public housing (representing 99% of all public housing in the United States), and in addition, they administer rental assistance for more than 2,000,000 housing units. In all, NAHRO member agencies administer low-income housing in which approximately 7.6 million persons reside. NAHRO has played a key role in the development and interpretation of the nation's housing programs since their inception. With respect to matters of policy, NAHRO serves fas the primary interface between the federal government and NAHRO's local housing agency members.

HDLI and NAHRO believe that the ruling in the court below, for which review by this Court is sought, is incorrect and that it unreasonably and improperly interferes with policies of the federal government and the discretionary decisions of local housing authorities, addressing the problems of illegal drugs and crime in public housing.

3. Petitioner, Delaware County Housing Authority, has given written consent through its counsel to the filing of a Brief of Amici Curiae by HDLI and NAHRO in support of its Petition for Certiorari.

Respondent, Barbara Bishop, was unrepresented in connection with the proceedings of the Commonwealth Court of Pennsylvania with respect to which review by this Court is sought. The undersigned counsel has confirmed with the legal counsel who represented Respondent at trial, that he has not

represented her in any appellate proceedings and does not now represent her. The undersigned counsel believes that it would be unseemly to seek the consent of Respondent, an unrepresented public housing tenant whose understanding of the nature and consequences of such consent could not be assured.

HDLI and NAHRO therefore respectfully request that Respondent be considered as having withheld her consent and that this Court consider this Motion as one filed under Rule 37.2(b) of the Rules of this Court.

4. This Motion and Brief are filed on the first date on which the undersigned counsel will have been admitted to the Bar of this Court, however, not within the time specified in Rule 15.3. Movant respectfully requests that the time for filing be extended until this date, as requested by letter to the Clerk of this Court in accordance with Rule 30.4.

Respectfully submitted,

March 19, 2001

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INTEREST OF THE AMICI CURIAE[1]

HDLI and NAHRO, the *amici curiae*, believe that ridding public housing developments of the historical problems of crime and violence, is crucial to maintaining the viability of public housing developments. They also believe that the process and standards under which public housing agencies enforce their leases is central to the successful management of public housing developments, crime reduction in those developments, and the physical and social well-being of the many law-abiding tenants of public housing. For these reasons, HDLI and NAHRO oppose the imposition of unnecessary or improper legal impediments to removing criminal elements from public housing because such impediments unacceptably diminish the safety, security, and quality of life for the community of public housing residents. These *amici curiae* regard the decision of the court below to constitute such an impediment.

As national organizations dedicated to the successful administration of the nation's public housing programs by local public housing authorities, HDLI and NAHRO believe that a decision by this Court concerning the issues presented in this case is necessary to assure national uniformity and to facilitate the provision of safe, decent public housing to low-income families.

SUMMARY OF ARGUMENT

A number of State courts and three federal courts have considered the issues raised by this case, with conflicting results. Guidance from this Court is necessary to assure that the applicable federal law will be properly interpreted by the state and federal courts.

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[1] In compliance with Rule 37.6 of this Court, *amici curiae*, HDLI and NAHRO state that the counsel named below, who serves as Executive Director and Counsel to HDLI, authored this brief in full, and that no party or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief. The *amici curiae* are described in the motion accompanying this brief.

The incidence of crime and illegal drugs in public housing is a matter of great concern to the federal government. This concern is directly reflected in federal policies authorizing the removal from public housing of families whose members engage in drug-related or other serious criminal activity.

Section 6 (l)(5) of the U.S. Housing Act of 1937 and the federal regulations and public housing lease provisions implementing it clearly and unambiguously provide authority for the termination of Mrs. Bishop's tenancy in this case, irrespective of whether she knew of the criminal activities that constitute the grounds for termination or had control over the household members engaging in such activities. Because the statute is unambiguous, resort to legislative history on the part of the lower court was improper. If, *arguendo*, the lower court properly considered legislative history, it erred in failing to consider relevant legislation subsequently enacted by Congress.

The lower court erred in failing to defer to the interpretation of the statutory language by the Department of Housing and Urban Development (HUD). It also usurped the discretion properly residing with the housing authority under applicable federal law. It improperly substituted its discretionary judgement for that of the housing authority concerning the appropriateness of terminating Mrs. Bishop's tenancy.

Imposing responsibility on the head of household to ensure that the conduct of household members conforms to the requirements of the public housing lease is vital to the successful administration of the federal public housing program.

ARGUMENT

I. THE DECISIONS OF STATE AND FEDERAL COURTS THAT HAVE CONSIDERED THE ISSUES RAISED BY THIS CASE ARE IN CONFLICT. GUIDANCE FROM THIS COURT IS NECESSARY TO ASSURE THAT THE APPLICABLE FEDERAL

LAW WILL BE PROPERLY INTERPRETED BY THE STATE AND FEDERAL COURTS.

Barbara Bishop's adult son Nathaniel, age 21, who was listed as a member of the household on Mrs. Bishop's public housing lease, raped and robbed, Mrs. Bishop's 68-year old neighbor. Shortly thereafter, her adult son, Ralph, age 32, who resided with Mrs. Bishop on a full-time basis, was caught in possession of cocaine and marijuana within the family's unit. The Commonwealth Court of Pennsylvania refused to allow the eviction of this family.

Legally, this case involves whether or not section 6(l)(5)[2] of the United States Housing Act of 1937 (42 U.S.C. §1437d(l)(5)) and implementing regulations of the Department of Housing and Urban Development permit a public housing authority (PHA) to terminate the public housing tenancy of an entire household based on the criminal misconduct of household members (or guests) other than the tenant head of household, where such tenant alleges that she had neither knowledge of the criminal activity nor control over the household members who committed the offenses. Such a tenant has been variously referred to in judicial opinions as either an "innocent tenant" or an "ignorant tenant" depending on viewpoint.

The Commonwealth Court of Pennsylvania determined that the statutory language in question was ambiguous, and, resorting to committee report language in order to ascertain Congressional intent, concluded that Section 6(l)(5) of the U.S. Housing Act did not authorize the termination of Mrs. Bishop's tenancy where she had no knowledge of her sons' criminal behavior, could not have foreseen it, and had no control over her sons. Other state and federal courts considering the propriety of evicting the innocent, or ignorant, tenant have sharply divided.

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[2] The Quality Housing and Work Responsibility Act of 1998 (Pub. L. 105-276, §575) renumbered this paragraph, which now is designated as §6(l)(6).

Since 1990, when the present version of Housing Act §6(l)(5) (now §6(l)(6)) was enacted, three federal courts, in two cases, have ruled upon the precise issues raised in this case. As discussed in some detail in the Petition, the Ninth Circuit Court of Appeals, *en banc*, recently withdrew and reversed an earlier decision of a three-judge panel of that court in Rucker v. Davis, 237 F.3rd 1113 (9th Cir. 2001). The court upheld the issuance by the Federal District Court of preliminary injunctive relief against four pending tenant evictions brought by the Oakland, CA Housing Authority. One involved off-premises drug possession by an adult household member; two involved drug possession on the premises of the development, but not in-unit, by household members who were minors; the fourth involved an incidence of in-unit drug possession by the caregiver for a disabled tenant.

Postulating hypothetical examples of possible evictions for off-premises drug use in a distant location by a household member, the court ruled 7 to 4 that the literal application of the Housing Act language and HUD's regulations would produce "odd and absurd" results that could not have been intended by Congress. Id. 1124-26. Regulations and lease provisions permitting such evictions were thus held to be unreasonable and in violation of the Housing Act's prohibition of unreasonable provisions in public housing leases. Finally, construing the reference to the tenant's "control" in the statutory language to apply to household members and guests, as well as to "other persons", the Court ruled that "the statute does not impose sanctions on tenants who have taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of another." Id. 1120, 1126. More specifically, the court fashioned its own rule, distinguishing cases in which the criminal activity occurs within the unit from those in which it occurs elsewhere, requiring in the former proof by the PHA that the tenant knew of the activity and failed to take reasonable steps to prevent it, and allowing in the latter a rebuttable presumption of knowledge on the part of the tenant. Id. 1126-27.

The four-member dissent asserted that the Housing Act is unambiguous, that the plain language of the statute authorizes the eviction of "ignorant tenants", and that the use of legislative history and hypotheticals by the majority was improper. Further, even if ambiguous the interpretation of the statute by HUD was permissible and reasonable and should be upheld under the doctrine of Chevron v. Natural Res. Def. Council Inc. *infra*. Id. 1128-29. The dissenting opinion also sharply criticized the interventionist approach taken by the majority, stating "If the majority believes HUD's construction of the statute is unconstitutional it should say so.... However, when this court rewrites legislative enactments and ignores the considered judgment of executive agencies –based on nothing more than the majority's understanding of what is "reasonable" or "absurd" – it is this court that has overstepped its constitutional limits." Id. 1129.

Petition to this Court by the Government concerning the decision of the Ninth Circuit Court of Appeals in Rucker is under consideration.

Subsequent to issuance of the opinion by the three-judge panel in Rucker, but before publication of the *en banc* opinion in that case, the United States District Court, Middle District of Florida, rejected a challenge to the eviction of several "innocent tenants" in Burton v. Tampa Housing Authority, Case. No. 8:99-cv-1238-T-26E (Unreported). The District Court granted the housing authority's motion for summary judgment, expressly following the reasoning of the three-judge panel in Rucker and an earlier opinion of the Fifth Circuit Court of Appeals in Chavez v. Housing Authority of the City of El Paso, 973 F.2d 1245 (5th Cir. 1992) which rejected various constitutional challenges to a housing authority policy that held tenants responsible for the on-premises criminal activity of guests. Like those in Rucker, the plaintiffs in Burton advanced constitutional and other theories, including the assertion that the statute is ambiguous and that resort to legislative history was necessary. In granting summary judgment, the District Court ruled that the statute was plain and unambiguous and that no resort to legislative history was therefore

necessary or appropriate. This ruling is under appeal to the Eleventh Circuit Court of Appeals.

The Supreme Courts of Minnesota and Tennessee, the only state Supreme Courts that have considered the issues in this case, reached contradictory results. Compare Minneapolis Public Housing Authority v. Lor, 591 N..W.2d 700 (Minn. 1999) (upholding eviction of entire family for drive-by shooting on public housing premises in which tenant's son participated, recognizing no requirement for proof of the tenants knowledge or participation, and limiting the scope of judicial review to determination of lease violation) with Memphis Housing Authority v. Thompson, 2001 Tenn. LEXIS 106 (Tenn. Feb. 20, 2001) (disallowing eviction of tenant for drug possession of guest occurring in her public housing unit, finding the lease provision based on federal statute and regulations to be ambiguous and construing it against the drafter).

Unsurprisingly, state intermediate appellate courts are in confusion regarding these issues. A number of state intermediate appellate courts have upheld terminations of tenancy in innocent tenant cases under various factual circumstances E.g., Housing Authority of New Orleans v. Green, 657 So.2d 552 (La. App. 4th Cir. 1995), app. denied, 661 So.2d 1355 (La. 1995), cert. denied, 517 U.S. 1169 (1996) (allowed eviction of tenant for drug-related criminal activity of son based on tenant's contractual obligation under the lease to assure that such activity did not occur); Minneapolis Public Housing Authority v. Holloway, CO-95-391, 1995 Minn. App. LEXIS 1028 (Minn. Ct. App. Aug. 15, 1995) (permitted eviction of tenant for criminal activity by persons allowed in her unit, rejecting argument that eviction was improper where the tenant could not have foreseen the activity or controlled the events leading to the termination of her tenancy); South San Francisco Housing Authority v. Guillory, 41 Cal. App. 4th Supp. 13, 49 Cal. Rptr. 2d 367 (1995) (eviction of entire family for son's drug possession allowed despite lack of parents' knowledge, where lease contractually obligated tenant to assure that drug crime not occur in the unit); Allegheny County Housing

Authority v. Liddell, 722 A.2d 750 (Pa. Commw. Ct. 1998) (PHA did not abuse its discretion in evicting innocent/ignorant tenant for drug-related crime of guest outside the unit, and lower court, in refusing to evict, improperly substituted its discretion for that of the PHA); Syracuse Housing Authority. v. Boule, 172 Misc.2d 254, 658 N.Y.S.2d 776, 780 (Syracuse City Ct. 1996), aff'd, 177 Misc.2d 400, 676 N.Y.S.2d 741 (Onondaga County Ct. 1998), rev'd, 265 A.D.2d 832, 701 N.Y.S.2d 541 (N.Y.App.Div. 4th Dep't 1999) (eviction of tenant permitted where tenant's babysitter and others had engaged in drug-related criminal activity in tenant's unit while she was at work and presumably unaware of the activity); Memphis Housing Authority v. Thompson, 1999 Tenn. App. LEXIS 506 (Tenn. Ct. of App. July 29, 1999) (allowed eviction for drug possession of guest where tenant had no prior knowledge of the criminal activity, ruling that tenant violated lease when she allowed the perpetrator into her unit and subsequently failed to assure that he did not engage in criminal activity there) rev'd 2001 Tenn. LEXIS 106 (Tenn. Feb. 20, 2001); Willock v. Schenectady Municipal Housing Authority, 706 N.Y.S.2d 503 (N.Y. App. Div. 2000) (where neither the statute nor HUD's regulation sets forth a requirement for knowledge by the tenant, eviction of tenant for drug possession of a guest was proper); Ann Arbor Housing Commission v. Wells, 618 N.W.2d 43 (Mich. Ct. App. 2000) (eviction of tenant for drug-related crime of brother was proper regardless of whether tenant had knowledge of the illegal activity) See also, Housing Authority & Urban Redevelopment Agency of Atlantic City v. Spratley, 327 N.J. Super. 246, 743 A.2d 309 (N.J. Super. App. Div. 1999) (federal law preempted New Jersey's anti-eviction law and federally mandated lease provisions holding tenant accountable for acts of household members or guests are not unreasonable and must be enforced); Barajas v. Housing Authority of Harlingen, 882 S.W.2d 853 (Tex. App. Corpus Christi 1994) (where household member sold drugs outside the unit, eviction of co-tenant was within the discretion of the housing authority).

A number of state intermediate appellate courts have reached the opposite result. E.g., Housing Authority of Charlotte v. Patterson,

464 S.E.2d 68 (N.C. App. 1995) (refusing to evict tenant for her son's homicide of neighbor where unless personal fault of tenant could be shown, resorting to Committee Report to ascertain Congressional intent after finding § 6(l)(5) of the Housing Act to be ambiguous); Vargas v. Franco, 656 N.Y.S.2d 628 (N.Y. App. Div. 1997) (refusing to evict tenant for repeated acts of graffiti outside the unit by tenant's son because eviction penalty deemed too harsh); Housing Authority of the City of Hoboken v. Alicea, 297 N.J Super. 310 (N.J. Super. Ct. App. Div. 1997) (PHA could evict tenant for drug possession of son in unit only if it could show that the tenant both permitted the offender to stay in the apartment and knew of his illegal activities); Dolson v. Middletown Housing Authority, 672 N.Y.S.2d 665 (N.Y. Sup. Ct. 1998) (tenant was not vicariously liable for conduct of her son) Minneapolis Public Housing Authority v. Lor, 578 N.W.2d 8 (Minn. Ct. App. 1998) (refusing to evict for son's participation in drive-by shooting on equitable grounds where tenant was out of town at the time and did not know of or participate in the criminal act) rev'd 591 N.W.2d 700 (Minn. 1999).[3]

II. THE INCIDENCE OF CRIME AND ILLEGAL DRUGS IN PUBLIC HOUSING IS A MATTER OF GREAT CONCERN TO THE FEDERAL GOVERNMENT. THIS CONCERN IS DIRECTLY REFLECTED IN FEDERAL POLICIES AUTHORIZING THE REMOVAL FROM PUBLIC HOUSING OF FAMILIES WHOSE MEMBERS ENGAGE IN DRUG-RELATED

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[3] The "innocent tenant" issue has also arisen in connection with terminations of Section 8 rental assistance. See e.g., American Apartment Management Co. v. Phillips, 653 N.E.2d 834 (Ill. Ct. App. 1995) (disallowing eviction on finding that lease provision similar to public housing lease provision at issue here was ambiguous and to be construed against the drafter) Phillips Neighborhood Housing Trust v. Brown, 564 N.W.2d 573 (Minn. Ct. App. 1997) (permitting eviction of both co-tenants for misconduct of one); Kimball Hill Management Company v. Roper, 733 N.E.2d 458 (Ill. Ct. App. 2000) (tenant must have some minimal connection with the criminal activity of third party to be subject to eviction).

OR OTHER SERIOUS CRIMINAL ACTIVITY.

While public housing was originally conceived in the late 1930's as a temporary way station for an out-of work middle class, by the mid-1980's many public housing developments had, for a variety of reasons, become the permanent home to families who represented the "poorest of the poor."[4] A majority of public housing residents were by then unemployed, becoming progressively more isolated from mainstream society, both socially and economically. Id. 897. These circumstances were accompanied by significant increases in the rates of crime, particularly drug-related crime. By 1988, the twin problems of crime and drugs in public housing were perceived as sufficiently serious to warrant passage by Congress of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4295, 42 U.S.C. §11901 *et seq.*[5]

The depth of the federal government's commitment to reduce illegal drugs and crime in public housing is seen, among other things, in the award by the Department of Housing and Urban Development

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[4] See generally, Schill, *Privatizing Low Income Housing Assistance: The Case for Public Housing*, 75 CORNELL L. REV. 878 (1990)

[5] The Anti-Drug Abuse Act contained, *inter alia*, the following findings: "(1) the Federal Government has a duty to provide public housing that is decent, safe and free of illegal drugs; (2) public housing projects in many areas suffer from rampant drug related crime; (3) drug dealers are increasingly imposing a reign of terror on public housing tenants; (4) the increase in drug-related crime not only leads to murders, muggings and other forms of violence against tenants, but also a deterioration in the physical environment that requires substantial governmental expenditures;..." 42 U.S.C. § 11901.

of grants aggregating more than *$2 billion*[6] under the Public and Indian Housing Drug Elimination Program authorized in the Anti-Drug Abuse Act. This funding has been earmarked solely for activities aimed at achieving a reduction of drug use and other crime in public and assisted housing.

Moreover, in March, 1996, President Clinton announced a federal anti-crime initiative known as "One Strike and You're Out" directing public housing authorities to enforce strictly lease provisions authorizing the eviction of public housing tenants. Under present federal policy enunciated in the "One-Strike and You're Out" initiative, public housing agencies are under a legal *obligation* to remove criminals from their properties.[7] In addition, HUD's Inspector General and the U.S. Department of Justice (DOJ) acted jointly in 1994 to create an anti-crime initiative in public housing known as "Operation Safe Home." This initiative establishes and operates intergovernmental task forces whose sole purpose is attacking crime in public and assisted housing. This program in public housing is coordinated with Drug Elimination Program activities and another DOJ initiative known as "Operation Weed and Seed," which seeks to reduce crime in public housing by combining crime suppression activities and social services.

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[6] HUD News Release No. 99-233, dated November 16, 1999, announced that more than $1.9 billion in Drug Elimination Grants had been awarded since 1989. The FY 2000 appropriation added approximately $310 million to this amount according to Agency Budget Summaries available electronically from the Office of National Drug Control Policy.

[7] It may be noted that public housing agencies that fail to protect tenants from criminal wrongdoers, including other tenants, may also be held liable for damages in tort, and on other grounds, for failing to provide adequate safety and security to their tenants. See e.g, Zuniga v Housing Authority of the City of Los Angeles, 48 Cal. Rptr. 2d 353, 41 Cal. App. 4th 82 (1995).

In addition to authorizing the Drug Elimination Program, the 1988 Anti-Drug Abuse Act, amended Section 6(l) of the United States Housing Act to enable those operating public housing to remove from tenancy families whose members engage in drug-related and other crime. Specifically, the amendment added to the public housing lease provisions mandated by Section 6(l) of the Housing Act, the following new provision requiring that public housing leases provide that:

> a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

Id., §5101, 42 U.S.C. §1437d(l)(5). This paragraph was amended and restated (without substantive change to the portions of the language at issue in this case) by the Cranston-Gonzalez National Affordable Housing Act of 1990 (NAHA) (Pub. L. No. 101-625, § 504, 104 Stat. 4079, 4185 (1990).[8] The amended language requires public housing agencies to utilize leases that:

> (5) provide that any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of household, or any guest or other person under the tenant's

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[8] The seriousness with which the 105th Congress regarded the problems of drug and crime in public housing may also be seen in its enactment in 1990 of Cranston-Gonzalez Act § 503(a). This provision added new subsection 6(k) to the U.S. Housing Act, allowing terminations of public housing tenancy involving drug-related and other criminal behavior that threatens other residents to be excluded from the PHA's administrative grievance procedure where the state eviction statute is determined by HUD to contain the elements of due process.

control, shall be cause for termination of tenancy. Id.

The 1990 amendment to Section 6(l)(5) of the U.S. Housing Act was implemented by the Department of Housing and Urban Development (HUD) by final rule, published October 11, 1991, entitled "Public Housing Lease and Grievance." (56 FR 51560 *et seq.*) The particular portions of this rule, which implement Section 6(l)(5), are found at 24 CFR §§ 966.4((f)(12) and 966.4(l)(2)(ii). These provisions closely track the statute and require public housing leases to contain provisions that obligate the tenant to assure that neither the tenant nor any household member, guest or other person under the tenant's control commit crimes. These regulatory provisions, in pertinent part, together with a copy of the pertinent provision of Mrs. Bishop's lease are set forth in the Appendix.

III. THE STATUTE AND REGULATIONS ARE CLEAR AND UNAMBIGUOUS. THEY PROVIDE UNEQUIVOCAL AUTHORITY FOR THE TERMINATION OF MRS. BISHOP'S TENANCY, IRRESPECTIVE OF HER KNOWLEDGE OF OR PARTICIPATION IN THE CRIMINAL ACTIVITIES OF HER SONS OR HER CONTROL OVER THEM.

That the very serious criminal activity in this case - acts of rape, robbery, and drug possession - constitute a sufficient basis for eviction, absent questions of the personal involvement of the tenant, Mrs Bishop, is not in dispute. However, the lower court found the statute and regulation to be ambiguous as it regards the eviction of a so-called "innocent tenant" such as Mrs. Bishop who asserts that she had no knowledge that the crimes committed by her sons would occur and that she had, in any event, no control over her sons.

Amici Curiae urge that the statutory language is not ambiguous. It plainly says that PHAs are required to utilize public housing leases providing that it shall be cause for termination of tenancy if either (1) the tenant, or (2) any household member, (3) or any guest or (4) any other person under the tenant's control, engages

in certain types of criminal activities. The statutory language contains no mention of a requirement of personal fault on the part of the head of household, or of knowledge or control over a household member. An ordinary reading of the statutory text will indicate that the word "control" refers to "another person" or possibly most broadly to a "guest or other person" under the tenant's control, not to a household member.

A. RESORT TO LEGISLATIVE HISTORY ON THE PART OF THE LOWER COURT TO READ INTO THE LAW A REQUIREMENT FOR KNOWLEDGE ON THE PART OF THE TENANT WAS IMPROPER.

The assertion of the lower court is, in essence, that the language of the statute is ambiguous, not so much because of what it says, but rather because of what it does not say. Applying such a standard subjects virtually any text that does not elaborate what it does not mean, or what it does not say, to a charge of ambiguity. This Court has stated that where the statutory command is straightforward, there is no reason to resort to legislative history. "Where there is no ambiguity in the words, there is no room for construction." United States v. Gonzales, 117 S.Ct. 1032, 1036 (1997). Only an "absurd or glaringly unjust result" "would warrant departure from the plain language of the statute." Inter-Modal Rail Employees Ass'n v. Atchison T&SF Ry. Co., 117 S.Ct 1513, 1516 (1997). "We have repeatedly recognized that "[when]...the terms of a statute [are] unambiguous, judicial inquiry is complete, except in "rare and exceptional circumstances....In the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." United States v. James, 478 U.S. 597, 606 (1986) (internal quotations and citations omitted). By these standards, and seen in the larger context of federal housing policy, Housing Act § 6(l)(5) should be given its plain meaning.

B. IF, *ARGUENDO*, THE LOWER COURT PROPERLY RESORTED TO LEGISLATIVE HISTORY, IT ERRED IN

FAILING TO CONSIDER RELEVANT LEGISLATION SUBSEQUENTLY ENACTED BY CONGRESS INDICATING A CONGRESSIONAL INTENT CONTRARY TO THAT ASSERTED BY THE LOWER COURT.

Housing Act §6(l)(5) was first enacted, substantively, in the 1988 Anti-Drug Abuse Act. This paragraph was amended and restated in the Cranston-Gonzalez National Affordable Housing Act of 1990, but without change to the operative portion of the language defining the persons whose acts will subject a public housing tenant to termination of tenancy - *i.e.*, "a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control". The committee report language relied upon by the lower court relates to the 1990 reenactment of this language.

To the extent that resort to materials extrinsic to the statutory language (construing statutory language previously enacted) is considered appropriate, *amici curiae* urge that consideration of subsequent legislation relating to control of crime in public housing would also be appropriate. Since 1990, Congress has legislated four times with respect to control of illegal drugs and crime in public housing. Its most direct expression of Congressional intent to authorize the exclusion and removal of entire households from public housing because of the criminal activity of individual members of the household is found in Subtitle F of the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276 (1998), §§ 575-579.[9]

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[9] Although not yet not reflected in the HUD regulations, §9(a)(2) of the Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, substituted the word "off" for the word "near" in this paragraph, thus permitting termination of public housing tenancy for drug-related criminal activity occurring off, but not necessarily near, the premises of public housing developments. The Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, § 903, amended Sections 6(l) and 8(d)(1)

§ 576(b) requires PHAs to establish standards that prohibit admission to federally assisted housing [which is defined to include public housing] for "any household with a member" who the PHA determines is illegally using a controlled substance or with respect to whom the PHA has reasonable cause to believe that such household member has a pattern of abuse of drugs or alcohol that may interfere with the health, safety or peaceful enjoyment of the premises by other residents.

§ 576(c), which relates to denials of assistance based on criminal background, provides that if a PHA determines "that an applicant or any member of the applicants's household" is or was during a reasonable period preceding the application engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety or right to peaceful enjoyment of other residents, the PHA may deny "such applicant" [*i.e.*, household] admission to the program or the federally assisted housing.

§ 577(a) provides: "Notwithstanding any other provision of law, a public housing agency or an owner of federally assisted housing (as applicable) shall establish standards or lease provisions for continued assistance or occupancy in federally assisted housing that allow the agency or owner (as

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of the U.S. Housing Act to authorize the termination of tenancy of tenants who are fleeing to avoid prosecution for a felony or are probation or parole violators (applied only to "tenants" without mention of household members). The VA, HUD and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, § 428, required PHAs to establish standards of occupancy that permanently prohibit admission to public housing or Section 8 programs, and "immediately and permanently" terminate the tenancy of any person convicted of manufacturing methamphetamines in a public housing unit.

applicable) to terminate the tenancy or assistance for any household with a member - [who is illegally using drugs or whose abuse of drugs or alcohol may constitute a threat to other residents]."(emphasis added)

In the face of this legislation, enacted in the context of HUD's "One-Strike and You're Out" Initiative, it is impossible to conclude that present federal policy prohibits the eviction of the "innocent tenant."

IV. IMPOSING RESPONSIBILITY ON THE HEAD OF HOUSEHOLD TO ENSURE THAT THE CONDUCT OF HOUSEHOLD MEMBERS CONFORMS TO THE REQUIREMENTS OF THE PUBLIC HOUSING LEASE IS ESSENTIAL TO THE SUCCESSFUL ADMINISTRATION OF THE FEDERAL PUBLIC HOUSING PROGRAM.

Imposing upon public housing agencies a requirement that they prove knowledge on the part of tenants concerning the activities of other household members is impractical. As pointed out in HUD's preamble to the 1991 Lease and Grievance rule, in practice it may be extremely difficult or impossible for a public housing agency to show that the tenant knew or could have foreseen a criminal act or failed to take all reasonable measures to prevent it. (56 FR 51567, See. Appendix) Agencies may have no capability to rebut self-serving testimony on the part of household members, whatever the truth may be. Public housing agencies (and other residents) should not be required by the courts to await victimization by a reoccurrence of criminal behavior before being able to evict. As both HUD and local officials have observed, the only practicable policy for deterring criminal misconduct in public housing members of public housing households must be to hold the only persons in a position to know all the facts responsible for the household's behavior.

V. THE LOWER COURT ERRED IN FAILING TO DEFER TO THE DEFINITIVE INTERPRETATION OF THE STATUTORY

LANGUAGE BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD).

The meaning ascribed by the lower court to Housing Act subsection 6(l)(5) directly contradicts conclusions reached concerning this language by HUD. The preamble to HUD's 1991 Lease and Grievance final rule, promulgating the applicable regulations, makes it clear that, with respect to the responsibility of the head of household for the conduct of other members of the household, HUD regards the language of subsection 6(l)(5) of the U.S. Housing Act as setting forth a liability standard based on contractual obligation. The standard is not vicarious, but rather direct, and it is unequivocal. Section 3.3 of the preamble discusses the rationale for the federal position and makes it clear the head of household has an affirmative obligation to ensure that members of the household do not engage in prohibited criminal behaviors. The text of this section of the preamble is set forth in full in the Appendix. The preamble addressed public comments received from advocacy groups objecting to the proposed regulatory language and urging that the rule be changed so that eviction of a public housing tenant for misconduct on the part of other household members be predicated on actual knowledge or ability to control. HUD rejected these suggestions.(56 FR 51566)

As pointed out in the Petition, this Court has repeatedly held that, where an agency charged with enforcing a statute has rendered an interpretation that is a permissible construction of the statute, a court may not substitute its own interpretation for that of the agency. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The lower court has raised no question of constitutionality in this case. Rather, in refusing to enforce the lease implementing the regulatory language, it has, in substance simply repudiated HUD's clear interpretation of the statute set forth in the regulatory preamble. In so doing, the lower court erred under Chevron.

VI. THE LOWER COURT USURPED THE DISCRETION PROPERLY RESIDING WITH THE HOUSING AUTHORITY

UNDER APPLICABLE FEDERAL LAW, IMPROPERLY SUBSTITUTING ITS DISCRETIONARY JUDGMENT FOR THAT OF THE HOUSING AUTHORITY CONCERNING THE APPROPRIATENESS OF TERMINATING MRS. BISHOP'S TENANCY.

The applicable provision of the U.S. Housing Act and HUD's regulations do not require a PHA to evict. They state only that public housing leases must provide that certain behaviors on the part of a tenant, any member of tenant's household, a guest or other person under the tenant's control *shall be cause for* eviction. Assuming that a lease violation is established, whether or not action will be taken to terminate tenancy and subsequently to evict rests within the discretion of the PHA. HUD's Public Housing Lease and Grievance regulations at 24 CFR § 966.4(l)(5) explicitly recognize this. This provsion is set forth in the Appendix.

The discretion to which these regulations refer resides with the PHA not the reviewing court.[10] The discretionary decision of the PHA should thus not be disturbed unless arbitrary, capricious, unsupported by substantial evidence, or abusive to such an extent as to amount to an error of law.[11]

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[10] See, Minneapolis Public Housing Authority v. Lor, 591 N..W.2d 700 (Minn. 1999) in which the Minnesota Supreme Court ruled that the reviewing court's function was only to determine if a lease violation had occurred and not to apply equitable principles with respect to the PHA's discretionary decision whether or not to evict based on the violation.

[11] Clark v. Alexander, 85 F.3d 146 (4th Cir. 1996) citing Ritter v. Cecil County Office of Hous. & Community Dev., 33 F.3d 323 (4th Cir. 1994). In Ritter, the court held that the decisions of a PHA with respect to its [guest] policies should, if consistent with federal housing provisions, be accorded "reasonable deference," meaning that the PHA's action should be upheld unless it is arbitrary and capricious. Id. 328. In Clark, the court accorded deference to the determinations of a PHA grievance hearing officer in an innocent tenant Section 8 termination case involving drug

The lower court concluded that the PHA was not required to consider mitigating circumstances with respect to the criminal activity of one of Mrs. Bishop's sons. "Nonetheless," the court continued, "we cannot agree that it [the housing authority] has complete discretion to evict a tenant under the circumstances presented here..." 749 A.2d 997, 1000. In so ruling, the court in effect, articulated the astounding conclusion that, by following HUD's regulation and HUD's interpretation of the statutory language published in connection with the regulation, the PHA had abused its discretion.[12]

The holding of the lower court and those of other courts refusing to evict the so-called "innocent tenant" appear to have an implicit basis in conceptions of equity and the avoidance of hardship to the tenant, rather than in recognized legal principles defining the limits of judicial review. Even so, a judicial focus in such cases only upon the perceived hardship to individual defendants represents an incomplete conception of equity, because it ignores the disastrous effect that drug-related and serious violent criminal behavior, such as that committed by Mrs. Bishop's household members, has upon other

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possession by a "family member." In so ruling, the court stated: "Plaintiff's conception of the standard and scope of review in this case would place federal courts and juries in the position of second-guessing every decision made by local housing authorities. The actual role of the courts is far more limited, even in actions brought under section 1983...." 85 F.3d 146, 153.

[12] A discussion of the central role that local housing agency discretion plays in terminations of public housing tenancy by PHAs and the role of the courts in reviewing the discretionary decisions of PHAs may be found in Maher, *Wisdom Revisited: Judicial Intervention and the Exercise of Discretion in "Strict Liability" Public Housing Evictions*, 8 J. AFFORDABLE HOUS. & COMMUNITY DEV. LAW 218 (Spring 1999). Commentary critical of interventionist approaches by the courts in the administration of housing programs by PHAs may be found in Smyers, *High Noon in Public Housing: The Showdown Between Due Process Rights and Good Management Practices in the War on Drugs and Crime*, 30 URB LAW. 573 (1998).

public housing residents.

Excessive focus on avoiding hardship to the defendants in these cases also ignores the reality that, in almost every instance, the retention of a family in public housing whose members commit crimes has the effect of excluding an equally needy family on the waiting list whose members are not criminals. Unlike federal benefit programs such as Food Stamps, federal housing benefits have never been an "entitlement" under which all income-eligible persons have a right to housing assistance. To the contrary, it has been estimated that, nationwide, the assistance available under the federal housing programs is sufficient to serve only *25 percent* of the persons who are actually eligible for such assistance.[13] The scarce resource that represents public housing ought to be reserved for families whose members do not prey upon their neighbors. Ultimately, someone must be responsible for the criminal behavior of household members. That someone must be the person responsible for introducing those engaging in the criminal misconduct to the public housing community.

CONCLUSION

For the foregoing reasons, *amici curiae* HDLI and NAHRO respectfully urge the Court to issue a writ of certiorari to the Commonwealth Court of Pennsylvania in this cause.

Respectfully submitted,

March 19, 2001

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[13] Kingsley, *Federal Housing Assistance and Welfare reform: Uncharted Territory*, The Urban Institute, New Federalism - Issues and Options for States, Series A, No. A-19 (Dec. 1997)

APPENDIX

APPENDIX

Excerpt, HUD 1991 Public Housing Lease and Grievance Rule Preamble (56 FR 51566-67)

3.3 *Eviction For Criminal Activity*

3.3.1 Crime By Household Member

Federal law provides that certain categories of criminal activity by a public housing household member are grounds for eviction. A PHA must: "utilize leases which-... provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, *engaged in by ... any member of the tenant's household* ... shall be cause for termination of tenancy ..." (U.S.H. Act, sec. 6(1)(5). 42 U.S.C. 1437d(1)(5)) {emphasis supplied}.

The U.S.H. Act statutory prohibition of criminal activity by a public housing household member was originally enacted in the Anti-Drug Abuse Act of 1988 (section 5101. Pub. L. 100-690. November 18, 1988), and was retained in the 1990 NAHA amendments which redefined the classes of criminal activity to which this prohibition applies (Pub. L. 101-625, section 504, amending section 6(1)(5) of the U.S.H. Act). The proposed and final rule provide that the tenant must assure that members of the household (or guests, or other persons under the tenant's control) do not engage in proscribed criminal activity (§ 968.4(f)(12)(i)).

Comment by legal aid and by tenant organizations asserts that the tenant should not be required to "assure" the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by members of the household. Comment proposes various possible standards to

determine whether the tenant can be evicted for criminal behavior by household members. Comment alleges that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant has done everything "reasonable" to control the criminal activity. Comment states that under the Constitution a tenant can only be held responsible for activity of a household member within the tenant's control.

PHA comment states that the PHA must be given discretion to evict an entire family for actions of a family member if eviction is in the best interest of other residents. If a PHA lacks clear authority to evict, the PHA may not be able to convince the family to oust a person who engages in criminal activity from the unit.

As in conventional tenancy, a public housing tenant holds tenure of the unit subject to the requirements of the lease, including obligations concerning the conduct of household members affecting the unit, the management of the housing or the welfare of other residents. By signing the lease, a tenant agrees to comply with leasehold requirements pertaining to the behavior of family members. The ability of a PHA or other landlord to enforce covenants relating to acts of unit residents (e.g., damage to a unit, disturbance of other residents) is a normal and ordinary incident of tenancy, and is important for management of the housing. The power of a landlord to evict for the tenant's breach of lease requirements concerning behavior of any member of the household gives the tenant and other occupants a strong motive to avoid behavior which can lead to eviction. If the tenant does not control criminal, or other harmful or disruptive behavior, by unit occupants, the landlord can evict - removing the occupants from the housing. If the landlord does not or cannot evict for such behavior, the continued presence of the tenant and household may result in harm to the housing or other residents, and the spread of such behavior.

The Congress has determined that drug crime and criminal threats by public housing household members are a special danger to the security and general benefit of public housing residents, warranting special mention in the law. (U.S.H. Act section 6(1)(5). 42 U.S.C. 1437d(1)(5).) For this reason, the Congress specified that these types of criminal activity by household members are grounds for termination of tenancy (without the need for a separate inquiry as to whether such criminal activity constitutes serious or repeated lease violation or other good cause for eviction). The legislative determination by the Congress rests on a reasonable judgement that the potential for a PHA to exercise eviction as a contractual sanction against criminal behavior by unit occupants will promote the welfare of public housing residents in general, and will support the effective management of the housing. Since this judgement is reasonable, and promotes a legitimate public purpose, the legislation is Constitutional under the normal equal protection standard.

There is no reason of Constitutional necessity or public policy for HUD to impose - as proposed by comment - any additional restriction on when the tenancy may be terminated for criminal activity by a household member.

First, as we have already remarked, contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing. The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

Second, if household member criminal activity is ground for termination, then the tenant has reason to try to control or prevent the activity to protect the tenant's right to continued occupancy by the family. The standards proposed by some of the

public comment would allow a variety of excuses for a tenant's failure to prevent criminal activity by household members. The proposed changes would thereby undercut the tenant's motivation to prevent criminal activity by household members.

Third, in practice it will be extremely difficult for the PHA to show that the tenant knew, could have foreseen, could have prevented, or failed to take all reasonable measures to prevent, crime by a household member. In practice, the tenant may have encouraged or profited from the criminal activity or may have ignored or turned a blind eye. The statute and regulations are based on a different, simpler and more practical test, whether a household member has in fact committed the criminal activity. In terminating tenancy for this reason, the PHA enforces the tenant's contractual duty, expressed in the lease, to prevent such activity by any family member. (If a tenant cannot control criminal activity by a household member, the tenant can request that the PHA remove the person from the lease as an authorized unit occupant, and may seek to bar access by that person to the unit.)

Finally, a family which does not or cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.

24 CFR §§ 966.4((f)(12) and 966.4(l)(2)(ii)

(f) The Lease shall provide that the tenant shall be obligated...
(12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
(A) Any criminal activity that threatens the health, safety or right of peaceful enjoyment of the PHAs public housing premises by other residents or employees of the PHA, or (B) any drug-related criminal activity on or near such premises.

Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

(2) *Grounds for termination...*
(ii) Either of the following types of criminal activity by the tenant, any member of the tenant's household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy:
(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents...."
(B) [Drug-related criminal activity]"

24 CFR § 966.4(l)(5)

Eviction for criminal activity - (i) PHA discretion to consider circumstances. In deciding whether to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit...."

Excerpt from Lease by and between Barbara Bishop and the Delaware County Housing Authority, dated January 1, 1994:

7. OBLIGATIONS OF TENANT:

The Tenant shall have the following obligations under this Lease:

....

L. Not to engage in criminal activity, including drug-related criminal activity, on or near the public housing Premises, and to have Tenant's guests, and family member or other person under Tenant's control refrain from such activity.